

SEP 19 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

TONY CAMPBELL,

Plaintiff - Appellant,

v.

J. BAILEY; et al.,

Defendants - Appellees.

No. 05-17242

D.C. No. CV-04-01292-MCE

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Submitted September 11, 2006 ^{**}

Before: PREGERSON, T.G. NELSON, and GRABER, Circuit Judges.

California state prisoner Tony Campbell appeals pro se from the district court's judgment dismissing for failure to exhaust administrative remedies his 42 U.S.C. § 1983 action alleging defendants subjected him to excessive force. We

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's determination that a prisoner failed to exhaust available administrative remedies, and review for clear error its findings of fact. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003). We affirm.

The district court properly dismissed the action without prejudice to refile because Campbell failed to exhaust administrative remedies prior to filing his original complaint. *See McKinney v. Carey*, 311 F.3d 1198, 1199-1200 (9th Cir. 2002) (per curiam) (holding that 42 U.S.C. § 1997e(a) requires dismissal without prejudice where a prisoner has not exhausted administrative remedies prior to filing suit).

Campbell's June 29, 2006 "Motion for Summary Judgment" is denied.

AFFIRMED.